Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,

No. 80-1377

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

HARLON L. DALTON
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
MARTIN GREEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States Navy's alleged plan to store nuclear weapons in an ammunition storage facility on the island of Oahu, Hawaii must be the subject of a publicly-disclosed "hypothetical" environmental impact statement under the National Environmental Policy Act of 1969, even though such a statement of necessity would reveal military secrets.*

---

* In addition to Secretary Weinberger, the petitioners are John F. Lehman, Secretary of the Navy; Admiral Thomas P. Hayward, Chief of Naval Operations; Rear Admiral Stanley J. Anderson, COMNAV Base Pearl Harbor; and Admiral Donald C. Davis, Commander-in-Chief of the Pacific Fleet. In addition to Catholic Action of Hawaii/Peace Education Project, and a second organization, Life of the Land, the respondents include James Albertini; Ian Yonge Lind; Eileen Belton; Peter Tagalog; Roger Sheetz; Edward Casey; and Nora Ogawa.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	7
Summary of Argument	11
Argument:	
The public disclosure of an environmental impact statement, including a "hypothetical" statement, concerning the storage of nuclear weapons at a particular site, would necessarily reveal classified and restricted military information that by statute must remain secret	12
A. The Atomic Energy Act prohibits the public disclosure of the fact that a specific military facility is a storage site for nuclear weapons, and of information relating to the design, capacity, and vulnerability of the site and the nature of the weapons stored there	14
B. NEPA does not require the public disclosure of information that by statute must remain secret	17
C. A publicly-disclosed environmental impact statement would reveal whether nuclear weapons are stored at a specific site, contrary to the Atomic Energy Act and its implementing regulations	20
D. The hypothetical environmental impact statement envisioned by the court of appeals would, of necessity, disclose classified information regarding the types of nuclear weapons the United States has developed, the design and destructive capability of such weapons, the design of the facilities in which they are stored, the capacities of such facilities and their vulnerabilities, and the steps taken to safeguard them	22
Conclusion	25

TABLE OF AUTHORITIES

Cases: Page

Andrus v. *Sierra Club*, 442 U.S. 347 13
C. & S. Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103 21
Committee for Nuclear Responsibility, Inc. v. *Seaborg*, 463 F.2d 796, application for injunction denied, 404 U.S. 917 21
Concerned About Trident v. *Rumsfeld*, 555 F.2d 817 21
EPA v. *Mink*, 410 U.S. 73 20
Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268.. 21
Flint Ridge Dev. Co. v. *Scenic Rivers Ass'n*, 426 U.S. 776 18
Hayden v. *Nat'l Security Agency/Central Security Service*, 608 F.2d 1381, cert. denied, 446 U.S. 937 20
Luftig v. *McNamara*, 373 F.2d 664 21
McQueary v. *Laird*, 449 F.2d 608 21
NRDC v. *Berklund*, 609 F.2d 553 19
Pauling v. *McElroy*, 278 F.2d 252, cert. denied, 364 U.S. 835 21
Pauling v. *McNamara*, 331 F.2d 796, cert. denied, 377 U.S. 933 21
United States v. *SCRAP*, 412 U.S. 669 18

Statutes and regulations:

Atomic Energy Act of 1946, 42 U.S.C. (& Supp. III) 2011 *et seq.* 3, 9, 14
42 U.S.C. 2014(y) 3, 14
42 U.S.C. 2161 ..... 3, 14
42 U.S.C. 2162 ..... 4, 14
42 U.S.C. 2162(a) 4, 14
42 U.S.C. 2162(b) 4
42 U.S.C. 2162(c) 4, 14
42 U.S.C. 2162(d) 5, 15
42 U.S.C. 2162(e) 5
42 U.S.C. 2166(a) 5-6, 19
42 U.S.C. 2277 ..... 6, 15

Statutes and regulations—Continued Page

Endangered Species Act of 1973, 16 U.S.C. (& Supp. III) 1531 *et seq.* 9, 10
National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.* 9
42 U.S.C. 4332 ..... 2, 9
42 U.S.C. 4332(2) 17
42 U.S.C. 4332(2)(C) 17, 18, 19
National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* 9, 10
Pub. L. No. 93-438, 88 Stat. 1233 14
Pub. L. No. 95-91, Title III, Section 301, 91 Stat. 577 14
5 U.S.C. 552(b)(1) 19
18 U.S.C. 793 ..... 6, 15
32 C.F.R. 214.8(i) (1979) 13
40 C.F.R. 1507.3(c) (1979) 13

Miscellaneous:

Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953).. 19
Exec Order No. 11652, 37 Fed. Reg. 5209 (1972).. 19
Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978).. 19
S. Rep. No. 1699, 83d Cong., 2d Sess. (1954) 15

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 643 F.2d 569. The opinion of the district court (Pet. App. 10a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was filed on July 17, 1980. An order denying a petition for rehearing (Pet. App. 9a) was filed on October 10, 1980. On January 5, 1981, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 16, 1981. The petition was filed on February 14, 1981

and granted on April 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, reads, in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special exper-

tise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes * * *.

2. The Atomic Energy Act of 1946, 42 U.S.C. (& Supp. III) 2011 *et seq.*, provides, in pertinent part:

42 U.S.C. 2014.

* * * * *

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

* * * * *

42 U.S.C. 2161.

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with

other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

42 U.S.C. 2162.

(a) *Periodic determination*

The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

(b) *Continuous review*

The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security.

(c) *Joint determination on atomic weapons; Presidential determination on disagreement*

In the case of Restricted Data which the Commission and the Department of Defense jointly determine to relate primarily to the military utilization of atomic weapons, the determination that such data may be published without consti-

tuting an unreasonable risk to the common defense and security shall be made by the Commission and the Department of Defense jointly, and if the Commission and the Department of Defense do not agree, the determination shall be made by the President.

(d) *Removal from Restricted Data category*

The Commission shall remove from the Restricted Data category such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and the Department of Defense jointly determine can be adequately safeguarded as defense information: *Provided, however,* That no such data so removed from the Restricted Data category shall be transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for co-operation entered into in accordance with section 2164(b) of this title.

(e) *Joint determination of the atomic energy programs*

The Commission shall remove from the Restricted Data category such information concerning the atomic energy programs of other nations as the Commission and the Director of Central Intelligence jointly determine to be necessary to carry out the provisions of section 403(d) of title 50 and can be adequately safeguarded as defense information.

* * * * *

42 U.S.C. 2166.

(a) Sections 2161 and 2165 of this title shall not exclude the applicable provisions of any

other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of those sections.

(b) The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law.

42 U.S.C. 2277.

Whoever, being or having been an employee or member of the Commission, a member of the Armed Forces, an employee of any agency of the United States, or being or having been a contractor of the Commission or of an agency of the United States, or being or having been an employee of a contractor of the Commission or of an agency of the United States, or being or having been a licensee of the Commission, or being or having been an employee of a licensee of the Commission, knowingly communicates, or whoever conspires to communicate or to receive, any Restricted Data, knowing or having reason to believe that such data is Restricted Data, to any person not authorized to receive Restricted Data pursuant to the provisions of this chapter or under rule or regulation of the Commission issued pursuant thereto, knowing or having reason to believe such person is not so authorized to receive Restricted Data shall, upon conviction thereof, be punishable by a fine of not more than $2,500.

3. 18 U.S.C. 793 provides, in pertinent part:

* * * * *

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance,

or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it * * * [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

1. During the early 1970's, many Hawaiians protested against the alleged storage of nuclear weapons at the Waikele branch of the Lualualei Naval Magazine on the island of Oahu, near Waipahu. Exhibit K to plaintiff's Motion for Preliminary Injunction, filed Mar. 20, 1978. They contended that the moving of nuclear weapons to and from the base by truck and helicopter, as well as the storage of such weapons at the base, constituted a hazard to all who lived in the heavily populated area surrounding Waikele (*ibid.*). The Department of the Navy neither admitted nor denied that nuclear weapons were being stored at Waikele since information relating to whether or not an installation is a storage site for nuclear weapons is classified.[1]

In 1974 and 1975, Navy officials undertook to transfer the ammunition and weapons stored at Waikele and elsewhere on Oahu to the West Loch branch of the Lualualei Naval Magazine, which had

[1] See pages 14-17, *infra*.

been used by the Navy for general storage since 1942 and for ordnance storage since 1959 (Pet. App. 12a). The transfer to West Loch of additional ordnance required the construction there of additional magazines and associated buildings, all of which were duly authorized by Acts of Congress.

In 1975, the Department of the Navy prepared an environmental impact assessment (Pet. App. 17a-26a) of how, if at all, the relocation to West Loch of the Waikele functions would affect the environment.[2] This assessment, which as eventually released made no mention of nuclear weapons, concluded that the construction of 48 earth covered magazines and associated buildings and the provision of security for those buildings would have no significant environmental impact. The assessment also concluded that "[t]here are no known significant species [of plants or animals] on the [construction] site" (Pet. App. 20a) and that the nearby Okiokiolepe fish pond (which is listed on the National Register of Historic Places) would not be affected. Consequently, no formal environmental impact statement was prepared at the construction stage. Three years later, the Department of the Navy prepared a "candidate" or generic environmental impact statement on "Nuclear Aspects of Naval Weapons Systems Storage" (*id.* at 27a-35a) which discussed in general terms, without reference to any specific storage site or surrounding locality, whether nuclear accidents could or were likely to occur, whether a nuclear accident could or would be likely to release radiation, and the extent to which

[2] The document prepared in 1975 was not, strictly speaking, an environmental impact "assessment." It was, and remains, classified. In June of 1977, that document was revised, and a portion of it was declassified and released to the public as an environmental impact assessment. The item reprinted in the Appendix to the petition is the declassified, publicly-available assessment.

stored nuclear warheads release low-level radioactive emissions.

In March of 1977, a contract was let for the construction of 30 of the projected 48 magazines. In April 1978, another contract was let for the remaining magazines, security fences, a guard house and other facilities (Pet. App. 2a). Work under both contracts has been completed and the magazines are in use.

2. In March of 1978, several groups and individuals who live near or engage in recreational activity in and around West Loch and who allege that the storage facility at West Loch is destined to house nuclear warheads, filed this action to enjoin the Secretary of Defense and various Navy officials from expanding the facility until they had complied with, *inter alia*, the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*, the Endangered Species Act of 1973, 16 U.S.C. (& Supp. III) 1531 *et seq.*, and the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (J.A. 4-11).

Following a hearing on the merits, the district court concluded (Pet. App. 10a-15a) that the proposed activity does not violate the latter two statutes. With respect to NEPA, the court held that although the construction and use of the storage facilities at West Loch would constitute major federal action within the meaning of Section 102 of NEPA (42 U.S.C. 4332), complete compliance with the Act was not possible since an environmental impact statement would include a discussion of the presence, number and location of nuclear weapons, of their design, utilization, capabilities and capacities, and of security measures and other devices associated with the storage and use of such weapons, and would therefore conflict with the security data provisions of the Atomic Energy Act of 1946, 42 U.S.C. (& Supp. III)

2011 *et seq.*, and with various federal regulations governing the disclosure of restricted and confidential information. Concluding that the Navy already had complied with NEPA "to the fullest extent possible," the district court entered judgment against the plaintiffs (Pet. App. 14a, 16a).

The court of appeals reversed (Pet. App. 1a-7a), and directed the Navy to prepare a "hypothetical" environmental impact statement assessing the "potential consequences of the storage of nuclear weapons at this particular site[,] [taking into] [c]onsideration * * * four environmental factors specified by [the plaintiffs] as being critically important * * *" (*id.* at 5a).[3] The court of appeals also directed the district court to reconsider, in light of the information contained in any such hypothetical environmental impact statement, whether the proposed expansion of the facility at West Loch implicated the National Historic Preservation Act of 1966 or the Endangered Species Act of 1973. Finally, the court of appeals "le[ft] to the district court the question whether injunctive relief is proper at this time" (*id.* at 7a).[4]

---

[3] The four factors are: the risk of nuclear accidents; the enhancement of that risk by the proximity of West Loch to three airports; the likely effects of a nuclear accident on the population and environment surrounding West Loch; and the effects of continued low-level radiation from nuclear warheads stored near populated areas. See Pet. App. 3a.

[4] On remand, the respondents have moved to enjoin, pending the filing of a hypothetical environmental impact statement, the movement of nuclear weapons into the West Loch storage facility, and to require the Navy to remove from West Loch any nuclear weapons already stored there. On March 25, 1981, the district court deferred consideration of the respondents' motion "until a date subsequent to disposition of this matter by the United States Supreme Court * * *."

SUMMARY OF ARGUMENT

Since the Navy consistently has acted on the premise that in general NEPA applies to all of its activities that significantly affect the quality of the human environment, including the expansion and operation of the ordnance storage facility at West Loch, the issue in this case is limited to whether the provisions of NEPA relating to the *public development, disclosure and dissemination* of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets.

The court of appeals attempted to steer a middle course between NEPA's disclosure requirements and the secrecy that, by statute, must attend nuclear installations. The resultant compromise—a publicly available "hypothetical" environmental impact statement—although perhaps reasonable in concept, is quite unworkable in practice. Any EIS, including one based on a series of hypotheses, that is responsive to the environmental concerns articulated by the court of appeals, would necessarily reveal highly classified information about the types of weapons in our nuclear arsenal, their design and capabilities, the design, capacities and vulnerabilities of the facilities in which they are stored, and the security measures employed in connection with them. The only way to avoid such a consequence would be to draft an EIS that in its unclassified form is so abstract, general and incomplete as to be, if not incomprehensible, of no appreciable benefit to anyone not privy to classified annexes. And neither of these unsatisfactory alternatives would provide the decisionmaker—the Navy—with as much usable information about the actual environmental impact of its true plans as would a "real," albeit wholly classified, EIS. Thus, the lower

court's creation neither serves the purposes of, nor is compelled by, the National Environmental Policy Act of 1969. Moreover, the requirement that the Navy file a hypothetical EIS in connection with the West Loch storage facility would necessitate the preparation of similar EIS's for every other facility capable of storing nuclear weapons, without regard for whether such storage is actually contemplated, lest filing or the failure to file be taken as a key to where weapons are to be stored. The consequent administrative burdens far outstrip any the court of appeals reasonably could have anticipated or intended.

ARGUMENT

THE PUBLIC DISCLOSURE OF AN ENVIRONMENTAL IMPACT STATEMENT, INCLUDING A "HYPOTHETICAL" STATEMENT, CONCERNING THE STORAGE OF NUCLEAR WEAPONS AT A PARTICULAR SITE, WOULD NECESSARILY REVEAL CLASSIFIED AND RESTRICTED MILITARY INFORMATION THAT BY STATUTE MUST REMAIN SECRET

The general applicability of NEPA to the Navy and to its weapons storage activities is not in dispute here. Without confirming or denying that nuclear weapons are presently or might in the future be stored at West Loch, the Navy consistently has acted on the premise that NEPA applies to its expansion and operation of the ordnance facility there. This is because the Department of Defense assumes that NEPA applies to all of its activities, classified and unclassified, including such highly classified actions as the maintenance and storage of nuclear warheads. Indeed, the Department's regulations on that score are unequivocal: "[t]he fact that a proposed action is of a classified nature does not relieve the proponent

of the action from complying with the requirements of [NEPA as set forth in the Department's implementing regulations]" (32 C.F.R. 214.8(i) (1979)).

In such circumstances, however, the same regulation goes on to provide that "[e]nvironmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information * * *."[5] Thus, the crucial question is not whether the Navy must or will comply with NEPA insofar as that statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose. Rather, at issue is whether the provisions of NEPA relating to the *public development*,

---

[5] The regulation also provides that "[w]hen feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public." 32 C.F.R. 214.8(i) (1979). Regulations of the Council on Environmental Quality (CEQ), whose "interpretation of NEPA is entitled to substantial deference" (*Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979)), are to the same effect (40 C.F.R. 1507.3(c) (1979)):

> Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

disclosure and dissemination of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets.

A. The Atomic Energy Act prohibits the public disclosure of the fact that a specific military facility is a storage site for nuclear weapons, and of information relating to the design, capacity, and vulnerability of the site and the nature of the weapons stored there

The Atomic Energy Act of 1946, 42 U.S.C. 2011 *et seq.*, declares that all data concerning the design, manufacture or utilization of atomic weapons are "'Restricted Data'" (42 U.S.C. 2014(y)), and requires the Atomic Energy Commission [6] to control the dissemination and declassification of such data "in such a manner as to assure the common defense and security" (42 U.S.C. 2161). The Atomic Energy Commission can, and indeed must, from time to time determine whether Restricted Data may, "without undue risk to the common defense and security," be declassified and published. 42 U.S.C. 2162(a). Where Restricted Data relate primarily to the military utilization of atomic weapons, the determination must be made jointly by the Commission and the Department of Defense. 42 U.S.C. 2162(c). Whenever the

[6] The Atomic Energy Commission was abolished and its functions under 42 U.S.C. 2162 transferred to the Energy Research and Development Administration on October 11, 1974. Pub. L. No. 93-438, 88 Stat. 1233. The Energy Research and Development Administration, in turn, was terminated and its functions under 42 U.S.C. 2162 transferred to the Department of Energy on August 4, 1977. Pub. L. No. 95-91, Title III, Section 301, 91 Stat. 577. Except where the context dictates otherwise, our references to the Atomic Energy Commission apply to its successor agencies as well.

Commission and the Department conclude that information relating to the military utilization of atomic weapons should no longer be restricted but at the same time should not be declassified, and that it can be "adequately safeguarded as defense information" (42 U.S.C. 2162(d)), they may lift its Restricted Data designation and thereafter apply to it the safeguards used to protect other classified defense information. See S. Rep. No. 1699, 83d Cong., 2d Sess. 8 (1954). Such information is designated by the military as "Formerly Restricted Data." [7]

The communication of Restricted Data to anyone not authorized by the Atomic Energy Act of 1946 to receive it is a criminal offense, punishable by a fine of not more than $2,500. 42 U.S.C. 2277. The furnishing of national defense information to an unauthorized person is a criminal offense, punishable by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. 18 U.S.C. 793.

To ensure that Formerly Restricted Data are "adequately safeguarded as defense information," the Energy Research and Development Administration [8] and the Department of Defense developed a Nuclear Weapons Classification Guide, CG-W-4 (Pet. App. 36a-45a).[9] That guide indicates generally what classification, if any, is to be given to various types of information. "U" means Unclassified, "C" means

---

[7] There is a further proviso to the effect that no Formerly Restricted Data may be "transmitted or otherwise made available to any nation or regional defense organization, while such data remain defense information, except pursuant to an agreement for co-operation" entered into as elsewhere provided for in the Atomic Energy Act of 1946 (42 U.S.C. 2162(d)).

[8] See note 6, *supra*.

[9] Although the guide is itself classified, portions of it have been declassified in connection with this litigation.

Confidential, "S" means Secret, and "TS" means Top Secret. "FRD" means Formerly Restricted Data. The following types of information, most of which are Formerly Restricted Data, require classifications ranging, depending upon the circumstances, from Confidential to Top Secret:

Item 1711: Planning or construction information revealing that installation is a nuclear weapons storage site (C-TS; FRD);

Item 1721: Information revealing installation is a storage site for nuclear weapons, whether or not presence of weapons can be determined (C-TS; FRD);

Item 1732: Quantity of nuclear weapons actually at a site (C; FRD);

Item 1742: Overall security measures for a site (S-TS);

Item 1743: Defensive plans for storage sites (S-TS);

Item 1744: Storage site vulnerability studies (S-TS);

Item 1752: That a particular Nuclear-Capable Unit actually has nuclear weapons (C-TS; FRD);

Item 1755: Number of nuclear weapons in storage or with a Nuclear or Nuclear-Capable Unit (C-TS; FRD).

The Department of the Navy has issued a classified manual entitled Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55-1 (Pet. App. 46a-56a) that follows the same classification scheme. The first seven items listed in the paragraph

above appear in the Navy Manual as items 2-11.1, 2-11.2, 2-11.6.2, 2-11.7.2, 2-11.7.3, 2-11.7.4, and 2-11.8.2, respectively.[10] The Navy also has issued to all its members an unclassified general directive, designated OPNAV INSTRUCTION 5721.1C (Pet. App. 57a-59a), forbidding them from revealing any information relating to the presence or absence of nuclear weapons or components on board any ship, station or aircraft.

It is readily apparent from this directive, from the nuclear weapons classification guides, and from the statute they implement, that information relating to the location, design, capacity, vulnerability and security of nuclear weapons storage sites, and to the design of the weapons themselves, is restricted or classified information, the disclosure of which is prohibited.

B. NEPA does not require the public disclosure of information that by statute must remain secret

The National Environmental Policy Act of 1969 provides that "to the fullest extent possible" federal agencies shall (42 U.S.C. 4332(2)):

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

---

[10] The eighth item undoubtedly also is listed in the Navy Manual, but not in the portion that has been declassified and made a part of the record in this case.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

That same section obligates federal agencies to consult with affected sister agencies and obtain their comments prior to making an environmental impact statement. Under NEPA, those comments as well as the comments and views of appropriate state and local agencies shall, along with the impact statement, "be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5 [the Freedom of Information Act]" (42 U.S.C. 4332(2)(C)).

Despite (or perhaps because of) the breadth of its sweep and the specificity of its command, NEPA requires no more than that agencies comply with its policies "to the fullest extent possible." To be sure, as this Court cautioned in *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), that phrase "is neither accidental nor hyperbolic" and "is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Id.* at 787. Nevertheless, the phrase is also a limitation that "recognizes * * * that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As [the Court] noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.'" *Id.* at 788. It therefore follows from NEPA itself that to the extent its public disclosure provisions cannot be reconciled with the nondisclosure provisions of the Atomic Energy Act of 1946, the latter must

prevail. Cf. *NRDC* v. *Berklund*, 609 F.2d 553, 558-559 (D.C. Cir. 1979). The same conclusion is dictated by the Atomic Energy Act of 1946 which expressly directs, at 42 U.S.C. 2166(a), that "no Government agency shall take any action under * * * other laws inconsistent with the [Atomic Energy Act's] provisions" governing restricted and classified information.

Moreover, insofar as disclosure to the public (as distinct from disclosure to sister agencies or other branches of government) of classified information is at issue, the disclosure requirements of NEPA and the nondisclosure requirements of the Atomic Energy Act of 1946 are not in conflict. NEPA provides that environmental impact statements and related comments shall be made available "to the public as provided by" the Freedom of Information Act. 42 U.S.C. 4332(2)(C). The latter statute, by its own terms, "does not apply to matters that are * * * specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order" (5 U.S.C. 552(b)(1)). Executive Order No. 12065, 43 Fed. Reg. 28949 (1978) confers upon specified officials, including the Secretaries of Defense and Energy,[11] the power to classify information if its release would pose a threat to national security. Pursuant to that Order and its predecessors,[12] the Secretary of Defense has, together with the Secretary of Energy where Form-

[11] The Secretary of Energy is the most recent successor to the Chairman of the Atomic Energy Commission with respect to the classification and declassification of restricted data. See note 6, *supra*.

[12] Executive Order No. 12065 superseded Exec. Order No. 11652, 37 Fed. Reg. 5209 (1972), which was in effect from June 1, 1972 until December 1, 1978. That order, in turn, superseded Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953).

erly Restricted Data are involved, placed a Confidential, Secret or Top Secret stamp on virtually all information relating to the storage of nuclear weapons. See pages 15-17, *supra*. Thus, were an environmental impact statement to address nuclear weapons storage, it would be exempt from the Freedom of Information Act (see *EPA* v. *Mink*, 410 U.S. 73, 84 (1973)) and, hence, from the public disclosure provisions of NEPA.

C. A publicly-disclosed environmental impact statement would reveal whether nuclear weapons are stored at a specific site, contrary to the Atomic Energy Act and its implementing regulations

Quite obviously, an environmental impact statement that acknowledged that nuclear weapons were (or were to be) stored at a particular site would violate the Atomic Energy Act of 1946. That vice could not be cured by dividing the EIS into an unclassified document that is disclosed to the public and classified appendices that are not. For, so long as the publicly-available document is directed at the storage of nuclear weapons, secrecy is breached.

The result, admittedly, may be that in some situations no meaningful adversary proceeding can be pursued. But, occasionally, "some of the interests of the adversary process are outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure." *Hayden* v. *Nat'l Security Agency/Central Security Service*, 608 F.2d 1381, 1385 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). In *United States* v. *Reynolds*, 345 U.S. 1 (1953), where the widows of persons who had died in the crash of a military aircraft sought from the government certain classified documents in connection with their claims for damages under the Tort Claims Act, the Court sanctioned the withholding of the documents, stating (*id.* at 11) that "even the most compelling necessity cannot overcome the claim of

privilege if the court is ultimately satisfied that military secrets are at stake." In a footnote to this statement, the Court referred to *Totten* v. *United States*, 92 U.S. 105 (1875), "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege." [13] 345 U.S. at 11.

To be sure, it is in theory possible to produce a statement without disclosing the nature of the governmental activity covered by it. But it is difficult to comprehend how the environmental impacts of that activity could be meaningfully explored. Moreover, even assuming that a subject-less statement would have some utility, unless environmental impact statements directed at the storage of *conventional* weapons were treated in a similar manner, the disparity would reveal that which the Atomic Energy Act of 1946 says must be kept secret—the location of nuclear weapons.[14]

---

[13] See also *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc). Cf. *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960); *Pauling* v. *McNamara*, 331 F.2d 796, 798 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964); *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir. 1967); *McQueary* v. *Laird*, 449 F.2d 608, 612 (10th Cir. 1971); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 796, 798 (D.C. Cir.), application for injunction denied, 404 U.S. 917 (1971); *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 831 (D.C. Cir. 1976) (concurring opinion).

[14] Indeed, to the extent that EIS's for conventional weapons storage sites are unclassified, the secrecy mandated by the Act would be breached even by public disclosure of the fact that a classified EIS had been prepared.

D. The hypothetical environmental impact statement envisioned by the court of appeals would, of necessity, disclose classified information regarding the types of nuclear weapons the United States has developed, the design and destructive capability of such weapons, the design of the facilities in which they are stored, the capacities of such facilities and their vulnerabilities, and the steps taken to safeguard them

The court of appeals apparently recognized that a standard environmental impact statement, if publicly disclosed, inevitably would reveal military secrets. In order to avoid that consequence while at the same time honoring NEPA, the court suggested at oral argument and developed in its opinion the concept of an EIS that would "hypothesiz[e], without conceding, that the [West Loch] facility will be put to the use for which it has been made capable," and would draw conclusions "based on a series of hypotheses covering the range of options which the facility has openly presented to the Secretary [of the Navy]" (Pet. App. 6a; footnote omitted).[15] The resultant hypothetical EIS [16] concededly would have the

[15] The Navy stipulated, for purposes of this case, that the West Loch facility is "capable" of storing nuclear weapons. Based on that stipulation, the court of appeals opined: "[t]he public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer), will be stored at West Loch" (Pet. App. 5a).

[16] In preparing environmental impact statements, federal agencies often must set forth hypothetical accident scenarios in order to present the necessary spectrum of potential environmental effects to which a fixed governmental action might give rise. Here, however, the court of appeals would compel the Navy not only to speculate about future disasters, but also to "hypothesize" about the nature of the threshold actions in which it may, or may not, be engaged.

virtue of neither confirming nor denying that nuclear weapons are being stored at a particular site,[17] and would keep secret the actual nuclear firepower at the Navy's disposal. However, even a hypothetical EIS would perforce disclose other information that is equally (or, in some cases, more highly) classified.

For example, were an EIS to hypothesize that a particular facility might store nuclear warheads of type A, that hypothesis would reveal that somewhere in our nuclear arsenal there exist weapons of type A. Similarly, an EIS that addressed, even as a hypothetical matter, the risk that a type A warhead might inadvertently be detonated, and the destructive forces, if any, that such a detonation would unleash, would of necessity touch upon the design of the weapon, its payload, and its destructive capability. Also pertinent would be the design and vulnerability, *vel non*, of the storage site, and the safety and security devices and measures surrounding it.

It may be thought that in a hypothetical EIS, at least, the disclosure of secret information could be avoided through the use of classified annexes. But here, too, seemingly innocuous information is inextricably intertwined with other information which must be kept secret. In view of the inescapable imperative that the Navy must err, if at all, on the side of nondisclosure, the publicly-available portion of a partially-classified hypothetical EIS undoubtedly would, in most instances and respects, be incomprehensible, or would be so abstract, general and incomplete as to be of no appreciable benefit to Congress, sister agencies, or the general public. Nor would the

---

[17] However, the fact of its preparation and dissemination would signal the storage of nuclear weapons unless "cover" hypothetical EIS's were filed in connection with other facilities. See page 24, *infra*.

Navy benefit from such an exercise. NEPA's overriding mandate that decisionmakers inform themselves of the environmental consequences of their proposed actions and take those considerations into account can best be served by the preparation, where appropriate, of a "real" EIS directed to the Navy's true plans, even if little, or none of the statement is released to the public.

Finally, the court of appeals' attempt to reconcile the irreconcilable would impose inordinate, and presumably unintended, administrative burdens on the Navy. The preparation of hypothetical EIS's for facilities where nuclear warhead storage is in fact contemplated probably would not place a significantly greater burden on the Navy than would the preparation of standard EIS's. But once the Navy prepares and disseminates an EIS hypothesizing the storage of nuclear weapons at one facility, it logically must do the same for every other facility capable of storing such weapons, for if hypothetical EIS's were prepared and disseminated only for those facilities where nuclear weapons in fact are stored, the EIS would serve as a kind of paper signpost advertising the site's existence and purpose. Consequently, hypothetical EIS's would have to be prepared not only for facilities actually capable of storing nuclear weapons, but for facilities perceived to have that capability as well, lest those who have guessed wrong be given a more accurate picture of our nuclear strength and flexibility. The make-believe make-work activity thus required to comply with the court of appeals' decision and at the same time preserve military secrets, in addition to entailing the expenditure of millions of dollars, would be unsettling,[18] controversial, time-

[18] Since a hypothetical EIS would have to be prepared for each ordnance facility conceivably capable of storing nu-

consuming (for the courts as well as for the Department of Defense),[19] and ultimately valueless. That effort is neither required by, nor does it serve the ends of, the National Environmental Policy Act of 1969.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

HARLON L. DALTON
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
MARTIN GREEN
Attorneys

MAY 1981

---

clear warheads, the average citizen necessarily would have a disconcertingly inflated impression of the amount of nuclear weaponry that surrounds him or her. Moreover, the hazards that attend nuclear installations would be similarly inflated since the "series of hypotheses" called for by the court of appeals necessarily would include worst-case scenarios much worse than any actually presented by a nuclear storage facility.

[19] Indeed, it is conceivable that the issue of the adequacy under NEPA of a completely fictional EIS could give rise to acrimonious litigation lasting several years, occupying the time and resources of many members of the bench and bar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 347709 341